United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-7647

To be argued by
HOWARD C. FISCHBACH

In The

United States Court of Appeals

For The Second Circuit

CONSTANTINE MONTAGNA,

Plaintiff-Appellant,

- against -

JOHN T. O'HAGAN, as FIRE COMMISSIONER OF THE CITY OF NEW YORK and as CHAIRMAN and TREASURER OF THE FIRE DEPARTMENT PENSION FUND (ARTICLE I) and the TRUSTEES of the FIRE DEPARTMENT PENSION FUND,

Defendants-Appellees.

BRIEF FOR PLAINTIFF-APPELLANT

HOWARD C. FISCHBACH
Attorney for Plaintiff-Appellant
78-15 221st Street
Flushing, New York 11364
(212) 465-4096

(9142)
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BRIEF FOR PETITIONER-APPELLANT

STATEMENT

This is an appeal from the memorandum and order (not officially reported), rendered in favor of the defendants in the United States District Court for the Eastern District of New York, Platt J. filed on the 23rd day of October, 1975 and the judgment entered thereon by the Clerk of the Court below on the 24th day of October, 1975 denying plaintiff's motion for summary judgment and granting defendants' motion for summary judgment dismissing the complaint.

QUESTIONS PRESENTED ON APPEAL

I. Was it reversible error for the District Court to apply a three year statute of limitations as a bar to plaintiff's cause of action which was predicated upon an unconstitutional impediment of certain contractual employment and constitutionally vested pension rights and benefits?

II. Was it reversible error for the District Court to hold that res judicata and collateral estoppel precluded plaintiffs from litigating this action when the central issue thereunder was one of first impression?

III. Was it reversible error for the District Court not to entertain the merits of plaintiff's novel claim that defendants established an arbitrary and invidously discriminatory classification violative of the Equal Protection Clause under the United States and New York State Constitutions which adversely impaired and diminished his contractual employment and constitutionally vested pension rights and benefits?

STATEMENT OF FACTS

From the commencement of his employment in the New York City Fire Department to the date of his retirement on a so-

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All page references are to the Joint Appendix unless otherwise specifically indicated.

called non service-connected disability, plaintiff was a member of Article I of the Fire Department Pension Fund.

Through civil service promotional examination, he attained the superior rank of Lieutenant in the Uniformed Fire Force of the New York City Fire Department, with a total service of 31 years.

Although the theory of this case raises no question as to whether palintiff's disability was incurred in line of duty or otherwise, the germane facts show that he was assigned to "light duty"* subject to terms and conditions contained in appropriate provisions of the Administrative Code of the City of New York, more particularly, Section B19-4.0, subdivision (a), paragraph 4 (49) thereunder. Plaintiff accepted his assignment of "light duty" and scrupulously refrained from filing an application for either service related or ordinary disability because of his desired intention of attainment of mandatory retirement age of 65 years (52).

Notwithstanding, after satisfactorily performing "light duty" tasks for which he was commended and duly certified from time to time by the Fire Department Medical Board as fit to

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* Whenever the words "light duty" appears in this brief, its application is intended to refer to "Limited Service Squad" assignment and not to a mere temporary assignment.

render such "light duty", sedentary in character, plaintiff was nevertheless thereafter retired on a non-service-connected disability although he was ready, willing, able and entitled, by law, to continue performance of "light duty" assignments theretofore guaranteed him. Subsequently in the absence of a specific authentic finding or certification by the Medical Board that plaintiff was unfit to thereafter perform "light duty" (50), to which he had previously been duly assigned, the instant plaintiff together with other fire-fighters and fire officers similarly circumstanced, commenced litigation in the Supreme Court of the State of New York. Thus, in Sarrosick, et al. v. Lowery, et al., decided by Mr. Justice Arnold L. Fein on March 30, 1973 (not officially reported) (15-23), the Court there was presented with the following questions: (1) Do the provisions of Article 5, Section 7 of the New York State Constitution and Sections B19-4.0 and B19-7.83 of the Administrative Code of the City of New York confer contractual rights upon plaintiffs which may be enforced in equity?; and (2) Did not the assignments to plaintiffs of "light duty", according to law, vest in them such contractual rights which the defendants could not breach, diminish or impair in contravention of the State Constitution and the pertinent Code provisions?

In the course of the trial, plaintiffs each testified

to accepting and relying upon the promises and inducements of the Fire Commissioner and his agents that, once placed in limited service (i.e. "light duty"), they would not be retired from the Fire Department until reaching mandatory retirement age of 65 years so long as the Medical Board certified them fit to perform "light duty", sedentary in character. Accordingly, these plaintiffs began their performance of "light duty" and, in reliance of the Fire Commissioner's promises and inducements, they waived their rights to apply for service-related disability retirement. As already noted herein, they were eventually all retired on ordinary disabilities despite Medical Board certification that each was fit to continue his respective "light duty" assignment. Evidence to the contrary was not produced by defendants.

Trial Term either ignored or erred when, in effect, it held by implication that (a) plaintiffs membership in the Fire Department Pension Funds as established by the Administrative Code of the City of New York mandated no such constitutional contractual rights to accord them protection against a breach, diminution or impairment of their rights sought in that litigation; and but for the failure of the defendants to raise objections thereto, equity could not enforce these rights; (b) plaintiffs assignments to "light duty" under either Ar-

ticle I or Article IB of the pension funds vested them with no constitutional contractual rights; the defendants could therefore breach, diminish or impair them without contravening the State Constitution, Article 5, Section 7, and the Administrative Code; (c) plaintiff Montagna, even with positive certification by the Medical Board that he was able to continue performance of his assigned "light duty", nevertheless, was legally retired as a member of Article I (Section B19-4.0) of the appropriate Fire Department Pension Fund; (d) equitable estoppel as asserted by plaintiffs was improperly applied against defendants; and (e) the words "subject to the rules governing such force, . . ." as they appear in Section B19-4.0, subdivision (a), paragraph 4, in relation to assignments of "light duty" to Article I membership and as implied and applied to Article IB membership, do not exclude the Quota System (34-45) utilized by the Fire Commissioner to replace incumbents in the Limited Service Squad.

In essence, the Justice at Trial Term purportedly supported his opinion on a completely different interpretation of Matter of Breen v. N.Y. Fire Dept. Pension Fund, 299 N.Y. 8 (1949) than the one claimed by plaintiffs, to wit, that an employee sustaining a service-related disability and assigned to "light duty" is entitled, pursuant to Section B19-4.0, subdivision (a),

paragraph 2 of the Administrative Code, to retention of "such light duties as a medical officer may certify him as qualified to perform" and could not be retired without his consent unless the Medical Board determined that he was unfit for "light duty" on the basis of a service-related disability. "No such requirement exists in the Administrative Code provisions applicable to non-service-connected disabilities."

On appeal, the Appellate Division, First Department, affirmed the decision below, without opinion, 352 N.Y.S. 2d 418 (1974). Plaintiffs leave to appeal to the State Court of Appeals was denied, 34 N.Y. 2d 514 (1974).

As a consequence of the decisional law promulgated in Sarrosick, it became abundantly clear that defendants, then as now, were and still are permitted to maintain a classification distinction governing "light duty" assignments favoring that class of employees sustaining service-related disabilities and assigned to "light duty" with continuation in such limited capacity until reaching mandatory retirement age, while adversely discriminating against the class of employees allegedly incurring non-service-connected disabilities, also assigned to "light duty" tasks, with forced early retirements prior to reaching the mandatory retirement age. Simply stated, the first class of employees enjoy rights preserving and protect-

ing their full retirement allowance and benefits, whereas the second class of employees, more particularly this plaintiff as an Article I member, the same retirement rights are diminished and impaired by early retirement.

Thus, the issue raised by this questionably arbitrary classification relative to plaintiff's contractual employment and constitutionally vested pension rights and benefits was litigated for the very first time in the United States District Court on April 22, 1975 (46-59). In this connection, plaintiff moved for summary judgment seeking (51-56) judgment (1) preserving and enforcing his constitutional rights under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and companion New York State Constitution, Article 1, Section 11 thereto, and the pertinent provisions of the Administrative Code of the City of New York applicable to his membership in the Fire Department Pension Fund (Article 1); (2) declaring null and void his forced and wrongful retirement for so-called non service-connected disability; (3) reassigning him to "light duty" in tasks he performed immediately prior to his forced retirement until reaching mandatory retirement age of 65 years; and (4) granting him the appropriate salary and wage differential adjustments between his allowed retirement allowance and full pay for the

effective periods of such retirement to date, among his other benefits and privileges.

Defendants simultaneously moved to dismiss the complaint by asserting, among other claimed affirmative defenses, that the cause of action was barred by a three year statute of limitations and res judicata and/or collateral estoppel (62).

In his memorandum dated October 23, 1975 (not officially reported), Judge Thomas C. Platt denied plaintiff's motion for summary judgment and dismissed the complaint on the aforementioned grounds urged by defendants. Plaintiff now appeals from that memorandum and order and judgment entered thereon.

CONSTITUTIONS AND STATUTES INVOLVED

UNITED STATES CONSTITUTION

Fourteenth Amendment, Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

NEW YORK STATE CONSTITUTION

"Article 1, Section 11. [Equal protection of laws; ***]
No person shall be denied the equal protection of the laws of the state or any subdivision thereof.***"

* * *

"Article 5, Section 7. [Membership in retirement systems; benefits not to be diminished nor impaired.]
After July first, nineteen hundred forty, membership in any pension or retirement system of the state or of a civil division thereof shall be a contractual relationship, the benefits of which shall not be diminished or impaired. Adopted by Constitutional Convention of 1938; approved by the people Nov. 8, 1938."

* * *

ADMINISTRATIVE CODE OF THE CITY OF NEW YORK

"Section B19-4.0. Payment of pensions; disability; retirement for service. - a. The board of trustees shall retire any member who, upon an examination, as provided in subdivision d of this section, may be found to be disqualified, physically or mentally, for the performance of his duties. Such member so retired shall receive from such pension fund an annual allowance or pension as provided in this section. In every case such board shall determine the circumstances thereof, and such

pension or allowance so allowed is to be in lieu of any salary received by such member at the time of his being so retired. The department shall not be liable for the payment of any claim or demand for services thereafter rendered, and the amount of such pension or allowance shall be determined upon the following conditions:

* * *

2. In case of partial permanent disability at any time caused in or induced by the actual performance of the duties of his position, which disqualifies him only from performing active duty in the uniformed force, the member so disabled shall be relieved by the commissioner from active service at fires and assigned to the performance of such light duties as a medical officer of such department may certify him to be qualified to perform, or he shall be retired on his own application at not less than three-fourths of his salary at the date of his retirement from the service, on an examination, as provided by subdivision d of this section, showing that his disability is permanent.

* * *

4. In case of partial permanent disability not caused in or induced by the actual performance of the duties of his position, which may occur after ten years' service in such depart-

ment, the member so disabled may be relieved by the commissioner from active service at fires, but shall remain a member of the uniformed force, subject to the rules governing such force, and be assigned to the performance of such light duties as a medical officer of such department may certify him to be qualified to perform, or, if such member be retired after the expiration of ten years' service the annual allowance to be paid to such member shall be one-half of the annual compensation allowed such member at the date of his retirement from the service.

* * *

"Section B19-4.0 - e. The board of trustees shall have the power to grant, award or pay a pension on account of physical or mental disability or disease, only upon a certificate of a medical board or a special medical board after examination as provided in subdivision d of this section. Such certificate shall set forth the cause, nature and extent of the disability, disease or injury of such member."

* * *

ARGUMENT

POINT I

THE COURT ERRED IN APPLYING A THREE YEAR STATUTE OF LIMITATIONS AS A BAR TO PLAINTIFF'S CAUSE OF ACTION.

There being no federal statute of limitations of general application, federal courts generally have applied what they deem to be the forum state's statute of limitations most in point to the federal cause of action. Moviecolor Ltd. v. Eastman Kodak Co., 288 F. 2d 80, 83, cert. den. 368 U.S. 821, 7 L. Ed. 2d 26, 82 S. Ct. 39 (2nd Cir. 1961); International Union of Operating Engineers v. Fischbach & Moore, 350 F. 2d 936, 938, cert. den. 384 U.S. 904, 16 L. Ed. 2d 358, 86 S. Ct. 1336 (9th Cir. 1965). In the instant case, the Court below found that courts in the Second Circuit "repeatedly held that the Statute of Limitations for a civil rights action is one for actions 'to recover upon a liability created by statute'" (131). To support its decision, the Court below cited a host of cases with civil rights matters totally dissimilar to the case at bar. Notwithstanding, the Court held that the controlling statute here was Section 214 (2) of the CPLR which prescribes a three year limitation period. Accordingly, the Court thus concluded that this cause of action was time barred.

Plaintiff contends that it was reversible error to apply Section 214 (2) of the CPLR when the applicable statute should be Section 213 (2) prescribing a six year limitation period. What the Court failed to take into consideration was that plaintiff's litigation was not the "classic" civil rights action limited exclusively to the Equal Protection Clause of the Fourteenth Amendment. Instead, this particular action, involving other constitutional ramifications under the New York State Constitution, Article 1, Section 11 and Article 5, Section 7 thereto, deals with an alleged unconstitutional classification which impaired and diminished plaintiff's contractual employment and constitutionally vested pension rights and benefits. (This precise issue is more fully discussed under Point III of this Brief at p. 29). Since the main aspects of this federal action are both constitutional and contractual in nature, they are significantly and essentially intertwined on the issue central to plaintiff's claim. This argument becomes abundantly clear when placed in proper perspective that defendants arbitrary classification, violative of the Equal Protection Clause, adversely affected plaintiff's contractual employment and pension rights and benefits - the latter of which was constitutionally protected under Article 5, Section 7 of the State Constitution. See Sgaglione et al. v. Levitt and Civil Ser-

vice Employees Association, Inc. v. Levitt, 37 N.Y. 2d 507 (1975), reported in 174 N.Y.L.J. 1, 2 (October 2, 1975); and Brown v. New York State Teachers' Retirement System, 25 A.D. 2d 344, 345, aff'd. 19 N.Y. 2d 779 (1967). Thus, in matters involving a disputed civil rights claim, as here, concerning, inter alia, a constitutionally contractual pension right, the only pertinent state statute of limitations is CPLR Section 213 (2) providing a six year limitation period. Walsh v. Andorn, 33 N.Y. 2d 503, 506 (1974). The lower Court, ignoring this vital aspect of plaintiff's action, erroneously adopted the standard three year period of limitations generally applicable to a variety of other civil rights actions which, unlike the case at bar, have never dealt with the novel issue presented here.

Since plaintiff's rights were adversely affected in October, 1969 by defendants arbitrary classification resulting in his forced and wrongful retirement from service, the commencement of this litigation in April, 1975 satisfies the time period prescribed under the aforesaid six year statute of limitations.

Assuming, arguendo, that the three year period of limitations under CPLR Section 214 (2) was applicable, it is even under such circumstances our contention that the lower Court also erred in this respect when it failed to consider tolling

that particular statute of limitations when applied in this action. As already noted, plaintiff was a party-litigant in the earlier Sarrosick action involving, on other grounds, issues relative to his forced and wrongful retirement. That action commenced on November 16, 1970 or some thirteen months after plaintiff's rights were adversely affected by the arbitrary classification established by defendants. At the time of Sarrosick, any statute of limitations regarding his later civil rights action (e.g., a three year statute of limitations) was tolled. Only after Sarrosick was finally reviewed through the state appellate process by plaintiffs there on March 27, 1974, would the statute of limitations purportedly applicable to this action again run until the commencement of Montagna in April, 1975.

Therefore, from the time of plaintiff's effective retirement date in October, 1969 to the commencement of Sarrosick in November, 1970 and the period following final appellate review in the state courts of that action (March, 1974) until the commencement of the instant action, the application of a three year statute of limitations, properly tolled, would not have barred this latter case. A computation of the periods involved indicates a lapse of only 26 months with 10 months remaining before a three year period of limitations would finally expire

and become operative.

With the foregoing in mind, plaintiff takes the same position urged in Mizell v. North Broward Hospital District et al., 427 F. 2d 468, 473 (5th Cir. 1970) "that while the federal court, sitting in a federal question case, properly applies a state statute of limitations where none is provided for in the federal statute sued upon, the federal court has the duty to apply a federally fashioned rule with respect to what constitutes 'tolling'". (Emphasis added). On this point, see Burnett v. New York Central R.R., 380 U.S. 324, 13 L. Ed. 2d 941, 85 S. Ct. 1050 (1965). The Court in Mizell, supra, at p. 474, was "persuaded that in cases arising under the constitution or laws of the United States, a federal rule on tolling a state statute of limitations (when applicable) should be observed, if such a rule clearly carries out the intent of Congress or of the constitutional principle at stake." This very standard, applicable to the case at bar, should have been but was not observed by the lower Court.

Failure to toll the three year statute of limitations held applicable in plaintiff's case was further compounded by the lower Court's erroneous view "that any claim for the deprivation of civil rights in connection therewith became time-barred in October of 1972 and hence his action instituted in April of

1975 is clearly barred" (132). The lower Court reached this conclusion by ignoring the existence of Sarrosick in relation to tolling the statute of limitations it felt was applicable in plaintiff's federal action. In this regard, such an erroneous ruling contravened well established decisional law enunciated in Monroe v. Pape, 365 U.S. 167, 183, 5 L. Ed. 2d 492, 81 S. Ct. 473, 482 (1961) and followed in Lombard v. Board of Education, 502 F. 2d 631, 635 (2nd Cir. 1974) that a civil rights claim is supplementary to any state action. To similar effect is Mizell v. North Broward Hospital District, supra, at p. 474, which held

> "...that it is clearly within the underlying purpose of the Civil Rights Acts to encourage utilization of state administrative and court procedures to vindicate alleged wrongs under a state-created cause of action before requiring a plaintiff to bring his federal suit to prevent his being barred by a state statute of limitations. Thus, although the federal courts apply a state limitations statute in suits to vindicate a federal right, they look to the federal purpose, policy and intent of Congress as the objective of the legislation in determining whether the pursuit of state remedies tolls this statute." (Emphasis added.)

Under these circumstances, therefore, the policy of repose inherent in the appropriate statute of limitations, designed to protect defendants, "is frequently outweighed, however, where the interests of justice require vindication of the plaintiff's

rights." Burnett v. New York Central R.R., 380 U.S. 428, 429, supra.

In the event the three year statute of limitations under CPLR Section 214 (2) is held to be applicable here, this Court should now look favorably upon the "tolling" standard and decisional law supporting plaintiff's contention that his action was timely brought even within that prescribed period.

POINT II

THE COURT ERRED IN HOLDING THAT RES JUDICATA AND COLLATERAL ESTOPPEL PRECLUDED PLAINTIFF FROM LITIGATING THE INSTANT ACTION.

Before reaching the issue as to whether or not the case at bar was precluded by res judicata and/or collateral estoppel, the Court below opined that "Plaintiff seeks to circumvent the impact of this statute and the above cited cases by characterizing his claim as one for impairment of a contractual obligation or liability" (132). Although plaintiff's cause of action is predicated upon certain contractual employment and constitutional pension rights and benefits, he does not share the lower Court's purported characterization regarding the statute of limitations. As noted in our Point I, supra, plaintiff never sought to avoid the impact of the statute of

limitations as applied here because the instant action was timely brought within the prescribed time periods of both the three year and six year statute of limitations. While the lower Court was inclined to believe otherwise and erroneously held that this federal action was time-barred, it, nevertheless, felt constrained to rule on defendants other affirmative defense, to wit, res judicata and/or collateral estoppel. In the latter instance, the court erred when it also held that plaintiff's action was similarly barred since he "made essentially the same equal protection arguments in the prior State court action as he advances here" (135). This conclusion was grounded solely on the Court's reliance on a cursory portion of the plaintiff's brief in Sarrosick (attached to defendants' affidavits in support of their motion to dismiss the instant action). Citing Newman v. Board of Education, 508 F.2d 277 (2d Cir.), cert. denied, 420 U.S. 1004 (1975), 46 L.Ed. 2d___, 95 S. Ct. __(1975), the lower Court found "that for a preclusion to be effective 'elaboration or citations of authority' must be presented in the State court proceeding and not just a mere mention of the constitutional question. As indicated . . . , the plaintiff elaborated the equal protection argument to the Appellate Division and presented it with numerous citations of

authority" (135).

At best, the concept of equal protection of the laws so-called argument in Sarrosick was discussed merely as dictum. Clearly, the pleadings there (attached to plaintiff's affidavits in support of his motion for summary judgment) show, beyond peradventure of doubt, that the equal protection argument relative to an invidious classification was never pleaded or conclusively adjudicated by the State courts in Sarrosick; nor, when that case was appealed, was this issue ever certified for Appellate Court review (89-91). Thus, the District Court's contention that the "equal protection argument" together with "numerous citations of authority" was presented in Sarrosick lacks merit. Plaintiff's Appellate Division brief in Sarrosick (87-125) contained one brief paragraph and two citations (as mere dictum) alluding to the equal protection clause under the State Constitution; whereas, in Montagna, twelve pages and numerous citations were devoted to this issue. Since there was no "elaboration or citations of authority" regarding this issue in the earlier litigation, the principle espoused in Newman v. Board of Education, supra, has no application to the case at bar.

From the standpoint of res judicata, plaintiff is not

barred from commencing another cause of action predicated on a singular issue totally dissimilar from those raised in a prior suit between the same parties. This particular point is extensively discussed herein in our treatment of collateral estoppel.

At the risk of repetition, it should at once be observed that there is no similarity in form or substance between the central issue presented in this federal action and in Sarrosick. The latter dealt exclusively with a breach of contractual employment and constitutional rights based on defendants expressed promises to and plaintiffs reliance thereon to remain on "light duty" despite the nature of their disabilities; while, here, plaintiff deals strictly with an "arbitrary and invidious classification" which also adversely affected these very employment and pension rights in violation of the Equal Protection Clause under the Fourteenth Amendment of the United States Constitution and companion New York State Constitution.

Although the same rights and benefits were involved in both actions, the wrongful acts of defendants alleged in the two complaints are quite different. On this precise distinction is Herendeen v. Champion International, __ F. 2d __ (2d Cir., 1975), 174 N.Y.L.J. 1 (November 12, 1975), where the Second Circuit

Court of Appeals reversed the lower Court for incorrectly dismissing that plaintiff's federal suit on the basis of res judicata because, in an earlier action between the same parties involving a similar right, plaintiff had lost on the merits in the State Supreme Court. The Court of Appeals found that there was no "measure of identity" in the two complaints "such that a judgment in the district court action could impair the parties' rights established by the judgment entered in the state court in the prior adjudicated state action." 174 N.Y.L.J. at p. 1, supra. The principle of law laid down in Herendeen should be followed here.

Even assuming that the two causes of action (i.e., Sarrosick and Montagna) have a similar measure of identity does not preclude the latter litigation. The mere fact that the two actions may relate in certain respects to the same subject matter (i.e., impairment and diminuation of contractual employment and constitutional pension rights) does not necessarily establish that they are on the same cause of action. Hence, "a judgment in a former action does not operate as a bar to a subsequent action where the cause of action is not the same, even though each relates to the same subject matter." 46 Am Jur. (2d), Judgments, Section 407; see also Cook v. Connors, 215 N.Y. 175, 178 (1915).

Other tests are employed in determining whether two actions are the same cause of action for the purpose of applying the doctrine of res judicata: (1) whether the two causes of action arise out of the same act or occurrence, and (2) the similarity of relief sought in the two actions. With respect to the first test, it has been held that the "mere fact that different demands spring out of the same act, occurrence, or transaction, does not ipso facto render a judgment on one demand a bar to an action on the other. This holding is based in the main upon the proposition that the wrongful act of the defendant, in itself, constitutes no cause of action, and becomes an actionable wrong out of the damages that it causes." 46 Am. Jur. (2d), Judgments, Section 409; also Perry v. Dickinson, 85 N.Y. 345 (1881). As for the second test, "a comparison of the relief sought in each action is not necessarily a proper test. It is clear that the mere fact that the same relief is sought in two actions does not make the causes of action identical within the meaning of the doctrine of res judicata." Id. at Section 412; and Cook v. Connors, supra.

Since plaintiff maintains that his cause of action substantially differs from Sarrosick, our attention is directed to the other throng of defendants' affirmative defense, to wit, colla-

teral estoppel; a doctrine which precludes relitigation only of material issues of law or fact that were actually litigated and determined by the prior judgment but does not work an estoppel as to matters which might have been litigated but were not. On this precise point, Commissioner of Internal Revenue v. Sunnen, 331 U.S. 591, 597-598, 92 L. Ed. 898, 68 S. Ct. 715 (1948) held that a ". . . cause of action involved in the second proceeding is not swallowed by the judgment in the prior suit, the parties are free to litigate points which [were] not at issue in the first proceeding, even though such points might have been tendered and decided at that time." To similar effect, see United States of America v. The Creek Nation, 476 F. 2d 1290 (1973); and, Schuylkill Fuel Corp. v. B. & C. Nieberg Realty Corp., 250 N.Y. 304, 307 (1929). Moreover, for the doctrine of collateral estoppel to be applicable, the determination of the issue must have been necessary to the prior court decision. Restatement (Second), Judgments, Section 68h (Tent. Draft No. 1, 1973); Lombard v. Board of Education, 502 F. 2d 631, 636, supra; and, Halpern v. Schwartz, 426 F. 2d 102 (2d Cir. 1970). Since the central issue of this federal action was not pleaded in Sarrosick, such an omission was of no consequence because it was not a necessary element to that earlier action, nor to the decision

ultimately rendered by the State court.

It is apparent from our discussion in Point III, infra, of this brief that the central issue at bar centers about the arbitrary and unequal classification treating dissimilarly employees assigned to "light duty" tasks who have sustained either service-related or non-service-connected disabilities regardless of their respective but same constitutional contractual pension rights. As asserted by plaintiff it is this so-called classification which denied him "equal protection of the laws" guaranteed under the Fourteenth Amendment to the United States Constitution and companion State constitutional provisions when he was forced into early retirement for an alleged non-service-connected disability. While this argument bears directly upon plaintiff's wrongful retirement from the New York City Fire Department -- a questionable retirement already litigated under different circumstances and principles of law involving, among others, this plaintiff -- the instant action deals with a new substantive constitutional issue inherent in the Equal Protection Clause which was not raised nor determined in that earlier lawsuit. Accordingly, in an ensuing cause of action between the same parties, the complaining party is "not precluded from contesting the constitutionality or existence and force of a

statute which was not brought to the attention of the court in the former suit." United States v. Moser, 266 U.S. 236, 237, 69 L. E 2d 262, 45 S. Ct. 66 (1924). Also see Monroe v. Pape, 365 U.S. 167, 174, supra; and, Lombard v. Board of Education, supra, at pp. 635-636.

Although the State courts in deciding and upholding Sarrosick, et al. v. Lowery, et al., supra, enunciated a rule of law, plaintiff in his subsequent action upon a different demand, as here, is not estopped from insisting that the law is otherwise, merely because the parties then as now are the same in both cases. See United States v. Moser, supra.

The doctrine of collateral estoppel must only be applied with its limitations carefully in mind so as to avoid injustice. See Restatement, Judgments, Section 71 (1948 Supp.); and Lombard v. Board of Education, supra, at p. 636. In this regard, therefore, plaintiff contends that the controlling legal principles purportedly developed by the Court in Sarrosick has allowed defendants to establish and maintain the aforementioned "light duty" classification which has and continues to derogate the Equal Protection Clause under the Fourteenth Amendment and related State constitutional guarantees. That, by reason thereof, the existing unconstitutional classification, buttressed by

such decisional law, has further changed the "legal atmosphere" adversely affecting plaintiff's rights as to make the doctrine of collateral estoppel inapplicable in this case.

Under these circumstances, this doctrine "is not meant to create vested rights in decisions that have become obsolete or erroneous with time." Commissioner of Internal Revenue v. Sunnen, supra, at p. 599 (emphasis added).

POINT III

THE COURT ERRED IN FAILING TO ENTERTAIN THE MERITS OF PLAINTIFF'S NOVEL CLAIM THAT DEFENDANTS ESTABLISHED AN ARBITRARY AND INVIDIOUSLY DISCRIMINATORY CLASSIFICATION VIOLATIVE OF THE EQUAL PROTECTION CLAUSE UNDER THE UNITED STATES AND NEW YORK STATE CONSTITUTIONS WHICH ADVERSELY IMPAIRED AND DIMINISHED HIS CONTRACTUAL EMPLOYMENT AND CONSTITUTIONALLY VESTED PENSION RIGHTS AND BENEFITS.

Since it was error for the Court below to hold that plaintiff's cause of action was barred by a three year statute of limitations and res judicata/collateral estoppel, the lower Court also erred when it failed to consider the issue central to this action. The main issue dealt with the proposition that plaintiff's contractual employment and constitutionally vested pension rights and benefits were impaired and diminished by an arbitrary and discriminatory classification established by defendants violating the Equal Protection Clause.

Justice Oliver Wendell Holmes, in Buck v. Bell, 274 U.S. 200, 208 (1927), called the Equal Protection Clause the "usual last resort of constitutional arguments." This prophetic statement is pertinent to the case at bar. As already noted, plaintiff was a party-litigant in Sarrosick where he, and others similarly situated, contested their wrongful and forced re-

tirements from service on principles of law other than those raised and discussed here for the first time. While again redressing the illegality of his forced retirement, plaintiff does so on the strength of a singular issue predicated upon the "equal protection of the laws" specifically guaranteed under Section 1 of the Fourteenth Amendment of the United States Constitution and companion New York State Constitution, Article 1, Section 11 thereto.

The Equal Protection Clause in relation to arbitrary and discriminatory classifications affecting adversely the rights of individuals or groups -- whether it be economic and social -- has been the pivotal point in litigation to remedy such classifications. On the basis of long standing decisional law, equal protection of the laws means the protection of equal laws (Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886)) which forbids all "invidious discrimination" by requiring that equal protection and security be extended to all under like circumstances. See Barbier v. Connolly, 113 U.S. 27, 31 (1885); also see Levy v. Louisiana, 391 U.S. 68, 72 (1968). Classifications which clearly demonstrate "invidious discrimination" offend the Constitution. On this precise point, see Ferguson v. Skrupa, 372 U.S. 726, 732 (1963); also see Lindsley v. National Carbonic Gas Co., 220 U.S. 61, 78-79 (1911);

Morey v. Doud, 354 U.S. 457, 463 (1957); and Williamson v. Lee Optical Co., 348 U.S. 483, 488-489 (1955). Thus, the guaranty of equal protection was and still is aimed at undue favor and individual or class privilege, on the one hand, at hostile discrimination, on the other. Truax v. Corrigan, 257 U.S. 312, 332-333 (1921).

With the foregoing principles of law in mind, it is noteworthy to cite a sampling of recent court decisions which struck down classifications considered obnoxious and constitutionally deficient. For example, the United States Supreme Court has ruled that under the Equal Protection Clause a State may not create a right of action in favor of children for the wrongful death of their parent and exclude illegitimate children from the benefit of such a right (Gomez v. Perez, 409 U.S. 535 (1973); and Levy v. Louisiana, supra); similarly illegitimate children may not be excluded from sharing equally with other children in the recovery of workmen's compensation benefits for the death of their biological parent (Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 175 (1972); also Davis v. Richardson, 342 F. Supp. 588 (Conn.), aff'd, post. p. 1069 (1972); and Griffin v. Richardson, 346 F. Supp. 1226 (Md.), aff'd, post, p. 1069 (1972); also see, Estate of Johnson, 348 N.Y.S.2d 315 (1973) and Estate of Flores, 357 N.Y.S. 2d 825 (1974). The New York State Supreme Court, in Sundram v. City of Niagara Falls, 357

N.Y.S. 2d 943 (1973), held that an ordinance which prohibited the issuance of a taxicab driver's license to all but United States citizens denied plaintiff, an Indian National, equal protection of the laws. In Dougall v. Sugarman, 339 F. Supp. 906 (S.D.N.Y.), aff'd, 413 U.S. 634 (1973), a section of the New York Civil Service Law, restricting civil service employment to United States citizens, was invalidated; Mohamed v. Parks, 312 F. Supp. 518 (D. Mass. 1973) where an ordinance of the City of Boston, restricting municipal employment to citizens suffered the same fate; and in Berger v. Adornato, 370 N.Y.S. 2d 520 (1973), a statute discriminating between males and females with respect to age at which each may marry without parental consent violated the Equal Protection Clause.

Of great significance, too, is the recent landmark case of Weinberger v. Wiesenfeld, 420 U.S. 636 (1975), where the Supreme Court found the pertinent Social Security Act provision providing widows but not widowers with survivor's benefits a denial of equal protection guarantees. By reason thereof, the Court found that such restrictions cannot sanction differential protection "since it unjustifiably discriminates against women wage earners required to pay Social Security taxes by affording them less protection for their survivors than is provided for men wage earners."

The foregoing cases offer relief to plaintiff here because his wrongful retirement resulted from defendants utilizing a statutory and regulator scheme -- complemented by a Quota System applicable only to those with non-service-connected disabilities -- to create a classification which invidiously discriminated against him. Such a classification, nurtured and maintained by defendants through custom and usage, was further buttressed by the erroneous ruling in Sarosick. In essence, it is this combination of practice and questionable legal precedent which now lends support to plaintiff's contention that he was denied the "equal protection of the laws" when defendants and their predecessors established an arbitrary and discriminatory classification treating employees disabled for various reasons and assigned to limited service (i.e., "light duty") differently depending on the nature of disability, service-related or non-service-connected. Put another way, employees of the Uniformed Fire Force of the New York City Fire Department sustaining a service-related disability, once assigned to "light duty", are permitted to remain in that capacity upon proper medical certification until reaching mandatory retirement age; while those incurring a non-service-connected disability, similarly situated and assign-

ed to "light duty", retain an uncertain status subject to forced early retirement prior to their attainment of mandatory retirement age. As a consequence of such preferential but unequal treatment, the latter class of employees' constitutional and contractually vested pension and retirement rights under Article 5, Section 7 of the State Constitution are diminished and impaired while these same rights are preserved and protected for the former class of employees permitted to remain in limited service until they reach the mandatory retirement age of 65 years.

Notwithstanding the nature of disability, neither a "rational basis" nor strong affirmative justification can be drawn from the statutory and regulatory scheme sanctioning the differential protection accorded one over the other under the aforementioned classification when both classes of employees are similarly circumstanced, having been duly certified and assigned, respectively, to "light duty" and whose same constitutional rights are affected by this very classification.

It is crystal clear, therefore, that the classification in question contravenes the Equal Protection Clause under both Federal and State Constitutions. Strictly speaking, the Equal Protection Clause means that "the rights of all persons must

rest upon the same rule under similar circumstances. . . . The classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." Louisville Gas Co. v. Coleman, 277 U.S. 32, 37 (1928) quoting, in part, F. S. Royster Guano v. Virginia, 253 U.S. 412, 415 (1920).

> (a) Plaintiff was denied "equal protection of the laws" when, pursuant to Section B19-4.0, subdivision a, paragraph 4 of the Administrative Code of the City of New York, he was assigned to "light duty" but thereafter, on the basis of a discriminatory classification, was wrongfully and prematurely retired on a non-service-connected disability prior to his reaching mandatory retirement age.

The facts show that plaintiff was found by the Fire Department's Medical Board to have sustained a non-service-connected disability. Irrespective of such finding, the Medical Board certified that plaintiff was qualified to perform "light duty" (14). Thereafter, and pursuant to Section B19-4.0, subdivision a, paragraph 4 of the Administrative Code (49), then Fire Commissioner Robert O. Lowery -- or his predecessors -- assigned plaintiff to the Department's Limited Service Squad. Subse-

quently, plaintiff was examined regularly by the Medical Board and after each examination, although found unfit for active fire duty, he was, nevertheless, simultaneously certified as fit to continue his "light duty" assignment. As noted, plaintiff performed such limited tasks so assigned until Fire Commissioner Lowery prematurely and wrongfully forced his retirement without any regard to his constitutional rights and the pertinent provisions of the Administrative Code, to wit: Section B19-4.0, subdivision e (50). This illegal action completely ignored the Medical Board's certification that plaintiff was certified as able to continue performance of work sedentary in nature and, by reason thereof, could not be retired under the pertinent Code provisions unless a certification was issued stating that he was unfit for the performance of fire duty including the duties of his position on a limited basis. On this precise point, see People ex rel. Cunningham v. Hayes, 65 Misc. 531, 532-533 (1910).

Despite law and statutory regulations to the contrary, the action taken against plaintiff was predicated upon an arbitrary classification preferentially distinguishing between service and non-service-connected disabilities in regard to affected employees rights to remain in limited service until reaching mandatory retirement age. Moreover, in Sarrosick the evidence showed that the Fire Commissioner admittedly utilized a Quota System (34-45) -- which the instant defendants continue to utilize -- to replace incumbents serving on the Limited Service Squad. This Quota System, established under the pretense that the Administrative Code language "subject to the rules governing such force, . . ." as it appears in Section B19-4.0, subdivision a, paragraph 4 thereof, in relation to assignment of "light duty," applied to Article I membership in the Fire Department Pension Fund. Since plaintiff was a member of Article I, he was subject, without his knowledge, to a Quota System (34-45) once assigned to "light duty." Significantly, however, this so-called Quota System applied -- and continues to apply -- only to those who, like plaintiff incurred a non-service-connected disability; this System did not affect employees then or now sustaining a service-related disability.

Although plaintiff as a party-litigant in Sarrosick, re-

lied on Matter of Breen v. N.Y. Fire Dept. Pension Fund, supra, to set aside, among other things, his forced retirement, Trial Term thought otherwise. There Justice Fein held that

> ". . . reliance on Breen v. Fire Department's Pension Fund . . . is misplaced. The Court of Appeals was construing Administrative Code Section B19-4.0, subdivision a, paragraph 2, (49) applicable to service-connected disability, entitling the members to retention on 'such light duties as a medical officer . . . may certify him as qualified to perform.' The Court [in Breen] held, in accordance with the statute, that the petitioners could not be retired without their consent unless the Medical Board made a determination that they were unfit for 'light duty' on the basis of a service-connected disability. No such requirement exists in the Administrative Code provisions applicable to non-service connected disabilities." (Emphasis added.)

While Breen may be distinguishable from the case at bar on the grounds that (1) petitioner there sustained a service-related injury whereas here plaintiff's injury was allegedly non-service-connected, and (2) the Courts there were asked to construe Section B19-4.0, subdivision a, paragraph 2 of the Administrative Code while here plaintiff's disability is covered under Section B19-4.0, subdivision a, paragraph 4 of the Code, the trial Court in Sarrosick, though erroneously upheld by the Appellate Court, misplaced the Breen decision when applying it differently to the aforesaid paragraphs "2" and "4"

(49). An examination of the pertinent paragraphs 2 and 4 set forth in Section B19-4.0, subdivision a clearly show contrariwise in that the requirement for continuation of "light duty" assignment is the same for both service and non service-connected disabilities. The rule governing both classes bears repeating: ". . . and be assigned to the performance of such light duties as a medical officer of such department may certify him to be qualified to perform, . . ." In either instance, therefore, the Medical Board must certify the affected employee fit to remain in the Limited Service Squad. Those with service-related disabilities are given no greater rights than those with non service-connected disabilities.

Whether an employee has sustained a service or non service-connected disability, he has, as a member of the appropriate Fire Department Pension Fund, specific constitutional rights in furtherance of his statutory rights extending to situations where a certification of "light duty" has been unqualifiedly granted and performed. Protecting only those who sustained a service-related disability and deprive others from falling into the latter category, whenever the question of "light duty" arises, is contrary to the legally mandated rights guaranteed employees suffering from either type of disability. To do other-

wise would sanction, as in the case at bar, defendants arbitrary and discriminatory classification of favoring one over the other, thus denying the employee with a non-service-connected disability, like plaintiff, "equal protection of the laws." In his dissent, Mr. Justice Harlan said that classifications of this kind "are impermissible because they bear no intelligible proper relation to the consequences that are made to flow from them." Glona v. American Guarantee & Liability Co. et al., 391 U.S. 73, 81 (1968) (emphasis added).

What makes the classification and judicial misinterpretation of the requirement common to aforesaid paragraphs 2 and 4 "impermissible" in plaintiff's case is that it had -- and still has -- the effect of producing the incongruous result of forcing a retirement on less favorable terms (half-pay), while permitting the member, with a service-related disability, the right to either enjoy a voluntary retirement (at three-quarters pay) or remain in "light duty" until reaching mandatory retirement age. In any event, the latter would receive substantially the same or greater retirement allowance had he, in fact, not voluntarily retired but chose, instead, to remain in "light duty." To similar effect, see Presiding Justice Peck's dissent in Matter of Breen v. N.Y. Fire Dept. Pension Fund, 273 App. Div.

689, 695, thereafter unanimously adopted by the State Court of Appeals.

Defendants actions by wrongfully and prematurely retiring plaintiff on a non service-connected disability, without proper medical certification, deprived him of his full retirement benefits and allowance had he otherwise remained in service assigned to "light duty" work. Such illegal action "bears no intelligible proper relation to the consequences that are made to flow" from the pertinent Administrative Code provisions applicable to plaintiff's retirement rights. Thus, the essence of plaintiff's main constitutional right to "equal protection of the laws" is that all persons similarly situated, that is, assigned equally to perform "light duty" regardless of the nature of disability, must be treated alike. Louisville Gas Co. v. Coleman, supra; F.S. Royster Guano v. Virginia, supra; Myer v. Myer, 271 App. Div. 465, 66 N.Y.S. 2d 83, motion denied, 271 App. Div. 823, 66 N.Y.S. 2d 618, appeal granted, 271 App. Div. 869, 66 N.Y.S. 2d 630, aff'd, 296 N.Y. 979 (1946); and Mallory v. City of New Rochelle, 184 Misc. 2d 91, 53 N.Y.S. 2d 643, aff'd, 268 App. Div. 878, 51 N.Y.S. 2d 91, appeal denied, 268 App. Div. 914, 51 N.Y.S. 2d 758, appeal denied, 294 N.Y. 839, aff'd, 295 N.Y. 712 (1944).

CONCLUSION

For the reasons set forth above, the District Court's granting defendants' motion for summary judgment against the plaintiff dismissing the complaint should be reversed and plaintiff's motion for summary judgment against the defendants should be granted.

Respectfully submitted,

Howard C. Fischbach

s/ Howard C. Fischbach
Attorney for Plaintiff-
Appellant

A 202 Affidavit of Personal Service of Papers LUTZ APPELLATE PRINTERS, INC.

UNITED STATES COURT OF APPEALS .
FOR THE SECOND CIRCUIT

CONSTANTINE MONTAGNA,
Plaintiff- Appellant,

- against -

JOHN T. O'HAGAN et.al.,
Defendant- Appellees,

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

I. Victor Ortega, *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 1027 Avenue St. John, Bronx, New York

That on the 9th *day of* Febrary *19* 76 *at* Municipal Building, New York, New York 10000

deponent served the annexed Brief *upon*

W. BERNARD RICHLAND

the Attorney *in this action by delivering* 2 *true copy* 3 *thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the herein.*

Sworn to before me, this 9th
day of Febrary *19* 76

Victor Ortega

VICTOR ORTEGA

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977